

The Prospects for Regulatory Reform: The Legacy of Reagan's First Term

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Four years ago, when the Reagan Administration was about to embark on its first term in office, it announced that “regulatory relief” would be a cornerstone of its economic program.¹ The Administration spoke of eliminating hundreds of obsolete and inefficient regulations,² revising major regulatory statutes like the Clean Air Act,³ and even abolishing several regulatory agencies.⁴ As Reagan's second term begins, regulatory issues are no longer so prominent. The words “regulatory relief” are no longer heard. Indeed, the only politically realistic prospects for statutory change involve strengthening, not weakening, major social regulatory statutes. And the only regulatory agency abolished has been the Civil Aeronautics Board, a victim of legislation passed during the *Carter* presidency.⁵

It would be a mistake, however, to consider the Reagan Administration's regulatory activities during its first term a failure. The Administration has surely left its mark on regulation. And in some areas—like presidential control over the rulemaking process—its changes are likely to be permanent. Nevertheless, the Administration did not achieve many of its stated objectives. Perhaps more importantly, prospects for achieving some of these objectives are less favorable now than when the Administration first took office—due, in some part, to the way it has handled regulatory activities, particularly during its first two and a half years.

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1. See, e.g., D. Stockman, *Avoiding a GOP Economic Dunkirk* (1980) (arguing that regulatory relief is necessary to avoid a “quantum scale-up of the much discussed regulatory burden”) (unpaginated memorandum on file with the *Yale Journal on Regulation*).

2. See, e.g., *id.*

3. See, e.g., *id.*

4. See generally *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, *REGULATION*, Mar.-Apr. 1981, at 14.

5. See *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744 (1978) (codified at 49 U.S.C. § 1551 (1982)).

As the Administration begins its second term, it seems appropriate to examine the regulatory legacy of the first four Reagan years. Section I of this Article describes the proposals for regulatory reform that were competing for support at the end of the Carter presidency. Section II analyzes the Administration's regulatory efforts during its first term and draws on this analysis to speculate about what reforms are politically possible in the second term. Section III focuses on the second-term prospects for regulatory change in four major areas that tell us something about the legacy of regulatory relief: the expanded use of market mechanisms; the devolution of regulatory authority to the states; the White House regulatory oversight function; and the revision of major aspirational statutes. The Article concludes by noting that absent significant legislative change, the legacy of the Reagan regulatory program will be an expansion of administrative discretion and presidential control over social regulation. Ironically, this will leave future presidents better equipped to reconstruct the regulatory edifice Ronald Reagan once promised to dismantle.

I. The Emerging Consensus in the Late 1970's for Regulatory Reform

By the end of the Carter Administration, a consensus had emerged among many economists and policymakers that economic and social regulation was overly expensive, inflexible, arbitrary, and ineffective. Although many disagreed over what should be done, recognition of the need for reform cut across party lines and traditional political affiliations. Many policymakers believed that the economic costs of regulation were excessive. This sentiment was bolstered by Murray Weidenbaum's estimate that the current regulatory policy was costing \$100 billion a year.⁶ Other estimates of the costs attributable to specific regulatory rules and of the costs incurred by specific sectors of the economy also supported this contention.⁷ The EPA, for example, estimated the cumulative cost of achieving clean

6. Weidenbaum, *On Estimating Regulatory Costs*, REGULATION, May-June 1978, at 14 (costs of regulation in 1979 "may top \$100 billion").

7. See, e.g., Portney, *The Macroeconomic Impacts of Federal Environmental Regulation* in, THE MACROECONOMIC IMPACTS OF FEDERAL ENVIRONMENTAL REGULATION, 25, 30 (H. Peskin, P. Portney, A. Kneese eds. 1982).

Virtually all analysts offering cost estimates conceded that they had not attempted to measure the social benefits of regulation and offset those benefits against estimated regulatory costs. See, e.g., M. WEIDENBAUM & R. DEFINA, THE COST OF FEDERAL REGULATION OF ECONOMIC ACTIVITY 3 (1978) (American Enterprise Institute Reprint No. 88). Indeed, studies failed to show that regulation was a significant factor affecting the conventional indicators of economic performance—inflation, production, economic growth and unemployment. See, e.g., E. DENISON, ACCOUNTING FOR SLOWER ECONOMIC GROWTH 122-44 (1979). But these facts did not lessen the impact cost estimates had on regulatory policy.

air and water alone would total more than \$360 billion between 1977 and 1986.⁸

Policymakers also noted that regulatory institutions tended to be highly inflexible and arbitrary, imposing costly inefficiencies on affected businesses.⁹ Bardach and Kagan argued that regulators adopted strict, legalistic enforcement approaches to avoid the criticism and political pressure which accompany even the appearance of undue leniency.¹⁰ They demonstrated that rigid adherence to rules left inspection routines insensitive to the unique characteristics of businesses and industries. Other critics observed that command and control regimes contributed to the system's arbitrariness and inflexibility. They argued that such regimes relied too heavily on highly prescriptive design standards and on detailed, inflexible rules that failed to account for diversity among regulated entities and created the impression of arbitrary patterns of enforcement.¹¹ The volume of information disclosure and paperwork required for regulatory compliance was also criticized.¹²

Perhaps the most damning criticism offered was that many regulatory schemes were simply not effective. This criticism focused on the lack of evidence of success by regulatory agencies. For example, although studies found that automobile accidents per mile traveled were decreasing, critics noted that the studies also showed that this trend predated the founding of the National Highway Traffic Safety Administration.¹³ Similarly, Lave and Omenn attributed the major portion of improvements in air quality during the 1970's to the switch from coal to oil in electric power generation rather than to standards issued under the Clean Air Act.¹⁴ Not surprisingly, such studies were controversial and were criticized for failing to consider what might have occurred in the absence of federal standards.

Some commentators went so far as to argue that regulation was *per se*

8. ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, THE COST OF CLEAN AIR AND WATER, S. DOC. NO. 38, 96th Cong., 1st Sess. 8 (1979) (figures presented in 1977 dollars).

9. E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 105 (1982).

10. *Id.* at 207-08.

11. See, e.g., Kahn, *Regulation and the Imagination*, in INNOVATIVE TECHNIQUES IN THEORY AND PRACTICE 1, 5-7 (1980) (Proceedings of a Regulatory Council Conference).

12. As Charles Schultze stated in his Godkin lectures at Harvard University: "The more complicated and extensive the social intervention, the more difficult it becomes to accumulate the necessary information at a central level. It is relatively easy to set up a system for payroll records from which to determine social security benefits. . . ." In contrast, "an efficient regulatory scheme to control the discharge of pollution into the nation's waterways requires that regulatory authorities know the production function, the range of technologies for pollution control and the demand curve of every major polluter." C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 20 (1977).

13. S. PELTZMAN, REGULATION OF AUTOMOBILE SAFETY 24 (1975). But see Graham & Garber, *Evaluating the Effects of Automobile Safety Regulation*, 3 J. PUB. ANAL. MGMT. 206 (1984).

14. L. LAVE & G. OMENN, CLEARING THE AIR: REFORMING THE CLEAN AIR ACT 1 (1981).

an unwise form of social control.¹⁵ Others asserted that regulators lacked the ability to control more than a minute fraction of the billions of individual decisions made daily concerning health and safety.¹⁶ These critics argued that market mechanisms, such as product liability laws and insurance, might be more effective means to influence social behavior.¹⁷

The above-mentioned critiques, taken together, represented a forceful indictment of regulatory excesses. Each of Ronald Reagan's three predecessors had tried to bring these excesses of regulation under control.¹⁸ The legacy of those efforts—the broadest of which was advanced by the Carter Administration¹⁹—was the emergence of a rough consensus both inside government and among academic critics on the proper underlying principles for regulatory reform.

This consensus reflected a belief that individual reforms should be neutral in character and application, and should not be dictated by political expediency. It also included a recognition that, although reform did not require expanding the scale of regulatory institutions, it did require strengthening their capabilities. Moreover, most advocates of reform agreed deregulation was appropriate in traditional areas of economic regulation, but inappropriate in areas of social regulation. They believed that the inevitable market imperfections in areas into which regulation had been introduced in the 1960's and 1970's required that such regulation be made more efficient rather than eliminated.²⁰ Regulatory reform was also

15. See, e.g., Reynolds, *A Free Market in Energy*, in *INSTEAD OF REGULATION* 67 (R. Poole, ed. 1982); Meiners, *What to do About Hazardous Products*, in *id.* at 285.

16. See, e.g., L. LAVE, *THE STRATEGY OF SOCIAL REGULATION* 2-3 (1981).

17. See, e.g., G. EADS & P. REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY AND PRODUCT SAFETY REGULATION* 120-38 (1984).

18. See, e.g., G. EADS & M. FIX, *RELIEF OR REFORM?* 45-68 (1984).

19. The Carter Administration attempted to reduce administrative expenses and compliance costs and to improve regulatory coherence by strengthening the power of the President to oversee regulatory activity. The Carter efforts included the creation of an explicit presidential oversight role through the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501-3520) (1982), and the creation of the Regulatory Analysis Review Group as an expert regulatory "watchdog." The Administration also created the Regulatory Council to help develop and encourage the use of more cost-effective forms of regulation. The Council later prepared an agenda of regulatory reform proposals which stressed: (1) enhancement of presidential oversight; (2) institutionalization of cost-benefit regulatory assessment procedures; (3) adoption of flexible regulatory alternatives and market mechanisms in lieu of traditional command and control regulation; and (4) further examination of non-governmental solutions (such as greater insurance availability) to problems previously viewed as primarily regulatory in character. See generally U.S. REGULATORY COUNCIL, *REGULATORY REFORM HIGHLIGHTS 1970-80: SUMMARY AND FINDINGS* 1-5 (1980).

20. The term social regulation has over the past few years been applied to the set of federal programs that use regulatory techniques to achieve broad social goals—a cleaner environment, safer and more healthful workplaces, safer and more effective consumer products, and equal employment opportunities. (The term protective regulation is also used to refer to these programs.) See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970) (establishing EPA). Most programs of social regulation originated in the 1960's and 1970's, although some—the programs of the Food and Drug Administration and the Department of Agriculture—go back several decades. See, e.g., Act of Oct. 31, 1949, ch. 792, § 401, 63 Stat. 1054 (current version at 7 U.S.C. § 1421-49

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considered to be a slow, incremental process. Because regulators and regulated entities had substantial sunk costs in existing regulatory regimes, the constituency supporting reform was small and politically unstable. It was therefore seen as crucial that the reforms proceed in a careful manner, so that public support would not be undermined.

II. The Regulatory Relief Efforts of the Reagan Administration During Its First Term

The regulatory relief program implemented by the Reagan Administration was based upon an entirely different set of premises from those underlying the earlier consensus. These premises were grounded in the libertarian view that most economic and social regulation was an unwarranted intrusion of the federal government into private decision-making. The 1982 Economic Report of the President clearly articulated this position:

Many government programs, such as detailed safety regulations or the provision of specific goods (rather than money) to the poor, are best described as paternalistic. Paternalism occurs when the government is reluctant to let individuals make decisions for themselves and seeks to protect them from the possible bad effects of their own decisions by outlawing certain actions. Paternalism has the effect of disallowing certain preferences or actions. . . . There is no reason to think that commands from government can do a better job of increasing an individual's economic welfare than the individual can by making choices himself. Moreover, the long-term costs of paternalism may be to destroy an individual's ability to make decisions for himself.²¹

Advocates of this perspective sought a wholesale repeal of economic *and* social regulatory regimes. The recent success of deregulatory efforts in areas of economic regulation was interpreted as indicating that deregulation in areas of social regulation was also feasible and desirable. Hence, the goal of regulatory relief was not to reform social regulation, but to elimi-

(1982)) (establishing price supports for agricultural commodities).

An important distinguishing feature of social regulation (especially to economists) is that one cannot expect even properly functioning markets to produce the goals that social regulation seeks. As far as economists are concerned, the problems of environmental pollution, excessive levels of workplace hazards, or unsafe consumer products exist largely because "commodities" like environmental quality, workplace safety, and product safety do not trade in markets. Economists work hard to devise ways to simulate markets for such "commodities," arguing that if this could be done, the goals of social regulation could be achieved at far less cost and with far less government interference in the details of business decision-making. But even the most optimistic of the economists' schemes contemplate some continued federal regulatory presence.

21. ECONOMIC REPORT OF THE PRESIDENT 42 (1982).

nate it, thereby removing impediments to economic growth and to the promotion of personal responsibility.

The new Administration originally accorded regulatory relief a place on its agenda equal to that given budget, tax, and monetary policy. The Reagan regulatory program was implemented much more quickly than the regulatory reform measures of previous administrations. It was based upon a theory of economic decisionmaking that places great weight on the value of "shocking" and was intended to "shock" regulatory expectations downward.²² This objective is articulated in David Stockman's "Dunkirk" memo, which called for a "dramatic substantial rescission of the regulatory burden for the short-term cash flow relief it will provide to business firms and the long-term signal it will provide for corporate investment planners."²³

The Reagan regulatory relief program consisted of three principal strategies. First, dozens of pending and existing administrative regulations would be delayed, rescinded, or revised. Second, agency enforcement policies and practices were to be altered to make the regulatory process more cooperative and less combative. Third, the federal regulatory bureaucracy was to be harnessed by strengthening presidential oversight of the regulatory process, by limiting the discretion of federal regulators, and by transferring their responsibilities to the states.

A. *Strengthening Presidential Oversight*

The centerpiece of regulatory relief was Executive Order 12,291,²⁴ which centralized regulatory oversight within the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget and called for the promulgation of a uniform cost-benefit standard that all regulations would be required to meet to ". . . the extent permitted by law."²⁵ In some respects the Order represented an extension of efforts

22. The Reagan Administration's economic game plan relied heavily on an immediate "expectations" shock — and on reaping its reward. Applying this approach to regulatory relief, it becomes immediately clear that the actual timing of any relief that might be forthcoming would have less impact on business decisions than the secure knowledge that relief would in fact occur. See, e.g., G. EADS & M. FIX, *supra* note 18, at 42 (1984).

23. D. Stockman, *supra* note 1.

24. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

25. *Id.* at 128. In several respects, the Reagan program represented a departure from past policy. First, it effectively shifted the burden of demonstrating that proposed regulations were cost effective from the White House to the agencies. Second, although it preserved requirements for regulatory impact analyses for "major" regulations (i.e., those having an impact estimated at more than \$100 million), it vested far greater discretion in the White House to designate as "major" regulations not meeting the dollar requirement and to exempt from analysis others that did. Third, for the first time cost-benefit analyses of regulations promulgated by executive branch agencies were made mandatory — except where prohibited by law. Fourth, where regulatory reviews had previously been distributed among several executive branch offices and departments (such as the Regulatory Analysis Review

taken during the Carter Administration to enhance the President's role in overseeing the regulatory process. Indeed, on its face the order did not constitute a major departure from Executive Order 12,044, promulgated during the Carter years.²⁶ The differences lay elsewhere—in practice and in the two administrations' underlying philosophies.

The Reagan order as implemented was criticized immediately for its lack of openness and questionable legitimacy.²⁷ By not requiring that OMB disclose comments made to agencies regarding changes in proposed or existing rules, the order converted OMB's role in the regulatory review process into an analogue of its behind-the-scenes efforts to prepare the federal budget. Critics pointed out, however, that while the President's budget is reviewed and revised by the Congress, federal regulations do not benefit from debate in a comparably democratic forum.²⁸

Imprudent comments by OMB officials,²⁹ continuing criticism regarding OMB officials' vulnerability to *ex parte* and unrecorded contacts with regulated entities, and the small and diminishing resources of OIRA raised serious doubts about the possible neutrality of the new OMB review process.³⁰ These concerns eventually began to stimulate reform proposals. For example, a key provision of Congressman Sam Hall's generic regulatory reform bill would have expressly prohibited the director of

Group and the Council on Wage and Price Stability), Executive Order 12,291 concentrated those functions within OMB's Office of Information and Regulatory Affairs (OIRA). Fifth, the process established by the Executive Order provided officers at OIRA not one, but two occasions for reviewing proposed regulations: their adequacy was reviewed before their promulgation in both proposed and final forms and OIRA was given the power to order delay of publication of contested rules while differences with the relevant agency were ironed out. See STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, *PRESIDENTIAL CONTROL OF AGENCY RULEMAKING: AN ANALYSIS OF CONSTITUTIONAL ISSUES WHICH MAY BE RAISED BY EXECUTIVE ORDER 12,291*, at 12-13 (Comm. Print 1981) [hereinafter cited as *PRESIDENTIAL CONTROL*].

26. See Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

27. *PRESIDENTIAL CONTROL*, *supra* note 25, at 60.

28. *Id.* at 54.

29. One of the most widely reported statements along these lines was made by Boyden Gray, Counsel to the Vice President, in a speech to the U.S. Chamber of Commerce. Gray told his audience to bring their problems with regulatory agencies to his attention. Gray reiterated his willingness to smooth out regulatory problems in an appearance before a House Subcommittee, declaring: "If you have a problem, if you think that they [the agency] are not recognizing and paying attention to the material that you give them, bring the material to me and or to us and we will see then what the problem is." *Role of OMB in Regulation, 1981: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 54 (1981).

30. See STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATION OF THE HOUSE ENERGY AND COMMERCE COMM., 98TH CONG., 2D SESS., *REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM AND OTHER MATTERS* 282-94 (Comm. Print 1984). The report observed that the OMB had at times "served as a conduit for affected industries by allowing the industries to comment directly to OMB on draft proposed rules and then passing the industry comments along to EPA as OMB's own." *Id.* at 292. Four Republicans on the 13 member committee dissented from the report. *Id.* at 295.

OMB from participating in "any way in deciding what regulatory action, if any, the agency will take in any rule-making proceeding."³¹

B. *Constraining Agency Discretion*

The Administration made three major managerial changes during the first term: steep budget cuts, agency reorganizations, and the appointment of ideologically uniform administrators. A number of regulatory agencies had their budgets reduced between fiscal year 1980 and fiscal year 1984.³² Hardest hit were agencies regulating the environment, land use, and consumer affairs, and agencies administering traditional economic regulation.³³ A series of reorganizations also affected agency staffing and capacity. For example, proposed changes at the Federal Trade Commission³⁴ and at the Office of Surface Mining³⁵ led to an exodus of seasoned enforcement staff and to a concentration of agency authority and activities in Washington instead of at agency regional offices. Repeated reorganizations of the Environmental Protection Agency's Enforcement Division also left that critical agency office in disarray.³⁶ Finally, many of the Reagan Administration's early appointments, particularly those at the sub-Cabinet level, were characterized more by ideological uniformity than by relevant administrative or political experience.³⁷ Taken together, these strategies seemed designed to constrain agency discretion and were widely perceived as having reduced regulatory capabilities.

C. *Transferring Regulatory Authority to the States*

The third area in which the Administration attempted to leave an institutional imprint was the transfer of regulatory authority and responsibility to the states. The Administration expected the transfer to speed up the regulatory process, broaden it to involve parties with the most complete

31. H.R. No. 2327, 98th Cong., 1st Sess. § 624(a) (1983).

32. G. EADS & M. FIX, *supra* note 18, at 151.

33. *Id.*

34. See *Proposed Closing of Four FTC Regional Offices: Hearing Before Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 97th Cong., 2nd Sess. 1 (1982).

35. See *Office of Surface Mining, Denver, Colorado: Hearing Before the Subcomm. on Civil Service of the House Comm. on Post Office & Civil Service*, 97th Cong., 1st Sess. 16 (1982). The Office of Surface Mining reorganization program led to a 49% attrition rate between January 1981 and June 1982 in the office's staffing in the GS-1 to GS-15 civil service grades, only about half of whom were replaced by the end of October 1982. Letter from Rep. Patricia Schroeder, Chairperson, Subcomm. on Civil Service, House Comm. on Post Office and Civil Service, to James Watt, Secretary of the Interior (Oct. 28, 1982) (letter on file with the *Yale Journal on Regulation*).

36. J. CLAYBROOK, *RETREAT FROM SAFETY: REAGAN'S ATTACK ON AMERICAN HEALTH* 128 (1984).

37. Anne Gorsuch's appointment as Administrator of the EPA is one example. See *N. Y. Times*, Feb. 20, 1981, at A23, col. 2.

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knowledge of regulatory impact, and increase its efficiency by enhancing the flow of information between regulators and regulated entities. The 1982 Economic Report to the President demonstrates the Administration's whole-hearted endorsement of this transfer of authority:

Regulation should take place at the appropriate level of government. The primary economic reason for most regulation is the existence of external effects. The costs or tolerance of these external effects may vary among locations. Economic efficiency, therefore, calls for the degree and type of regulation to vary also. National standards tend to be too severe in some regions, while being too lax in others. Federal regulations should be limited to situations where the actions in one State have substantial external effects in other States, constitutional rights are involved, or interstate commerce would be significantly disrupted by differences in local regulations.³⁸

Consistent with these premises, the pace of formal delegation of federal regulatory responsibility to the states was quickened,³⁹ regulations governing the transfer of that authority were relaxed,⁴⁰ and both the formal and informal oversight of states activities by federal regulatory agencies was reduced.⁴¹

The Administration's *modus operandi* in effecting the transfer, however, undercut political support. At the same time states were being called on to assume a greater share of the national regulatory burden, the federal government sharply reduced its funding for state programs. For example, although new state obligations to control pollutants mounted between 1980 and 1984, EPA grants to support state environmental programs fell in real terms by one-third.⁴² Moreover, budget restrictions hampered the

38. See ECONOMIC REPORT OF THE PRESIDENT, *supra* note 21, at 166.

39. For example, 27 state delegations of Phase I program authority under the Resources Conservation and Recovery Act, 42 U.S.C. § 6926 (1982), were completed during the first 24 months of the Reagan Administration. G. EADS & M. FIX, *supra* note 18, at 214-15. Although prior efforts of the Carter administration and program maturity are responsible for a significant proportion of these delegations, it is clear that the Reagan administration has accelerated the rate at which formal delegations such as these have proceeded. *Id.* at 220; see also COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1982, at 10 (1982).

40. For instance, in October 1981 the Office of Surface Mining revised by rulemaking what is termed the "State Window Rule" to relax requirements state programs would have to satisfy to be eligible for program delegation. 46 Fed. Reg. 53,376 (1981) (codified as amended at 30 C.F.R. §§ 730-732 (1984)).

41. An example is the Environmental Protection Agency's adoption of a revised review process, 47 Fed. Reg. 27,073 (1982) (to be codified at 40 C.F.R. pt. 52), which streamlined approvals of amendments to State Implementation Plans (SIP) under the Clean Air Act, 42 U.S.C. § 7410 (1982). From January 1981 through October 1982, the number of SIP revisions pending dropped 97%, from 643 to 20. G. EADS & M. FIX, *supra* note 18, at 226.

42. CONGRESSIONAL BUDGET OFFICE, THE BUDGET OF THE ENVIRONMENTAL PROTECTION AGENCY: AN OVERVIEW OF SELECTED PROPOSALS FOR 1985, at 7 (1984). State obligations to control pollutants are discussed at *supra* note 40.

implementation of innovative regulatory techniques, such as emissions trading, which relied heavily on state participation and required substantial front-end expenditures.

Furthermore, the Administration's selective enthusiasm for regulatory federalism called the neutrality of the strategy into question. The Administration's treatment of the regulation of hazardous workplaces provides a good example. Within weeks after Reagan took office, the Occupational Safety and Health Administration (OSHA) withdrew a proposed federal standard designed to provide information to employees about chemical hazards in the workplace.⁴³ After the withdrawal, a number of states and localities passed their own employee "right to know" statutes.⁴⁴ However, following complaints by affected companies over the stringent new state and local regulatory regimes⁴⁵ and assertions that a uniform federal standard was needed,⁴⁶ OSHA reentered the field promulgating new rules. OSHA prohibited states from adopting regulations more stringent than it had promulgated and from regulating industry categories not covered by federal regulations.⁴⁷ Federal preemption was complete.⁴⁸

III. The Impact of the Administration's Approach on Future Efforts for Regulatory Reform

At the end of its first term, the Reagan Administration was able to claim a measure of success for its regulatory relief program. It had reduced the number of new regulations promulgated by the federal government,⁴⁹ rescinded a number of regulations pending at the time of Reagan's election,⁵⁰ and strengthened and expanded presidential oversight of the regulatory process.⁵¹ In some areas regulatory responsibility had been shifted to the states,⁵² and some progress had been made in reducing regulatory costs.⁵³ Productivity gains for business had been stimulated, al-

43. 46 Fed. Reg. 12,214 (1981) (withdrawing notice of proposed rulemaking setting forth proposed standard requiring employers to identify hazardous chemicals in workplace).

44. See Foote, *Beyond the Politics of Federalism: An Alternative Model*, 1 YALE J. ON REG. 217, 221-22 & n.18 (1984).

45. See, e.g., *Office of Management and Budget Control of OSHA Rulemaking: Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 97th Cong., 2d Sess. 21 (1982) (testimony of George H. R. Taylor, Director, Department of Occupational Safety and Health, AFL-CIO) [hereinafter cited as *Hearings*].

46. See, e.g., *An OSHA Rule Industry Wants Despite the Cost*, BUS. WK., Nov. 7, 1983, at 47.

47. 48 Fed. Reg. 53,280 (1983) (codified at 29 C.F.R. § 1910 (1984)).

48. See Foote, *supra* note 44, at 222-24.

49. See, e.g., G. EADS & M. FIX, *supra* note 18, at 166-67.

50. *Id.* at 168, 180.

51. See *generally id.* at 108-12.

52. See *id.* at 220.

53. See *id.* at 236-37.

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though not nearly to the extent claimed by the Administration.⁵⁴ The Reagan Administration, however, had not achieved its broader goal of rolling back social regulation permanently. Few enduring changes had been made, and, by 1984, institutional and political support for broad regulatory reform had eroded. The generally unpromising atmosphere for social reform resulted from two early strategic miscalculations.

The first miscalculation occurred close to the outset of Reagan's first term. The Administration imported into the arena of social regulation the deregulatory strategies and rhetoric which had been previously employed in the realm of economic regulation.⁵⁵ The result was a set of strategies which led to a deterioration of institutional capacity in many regulatory agencies. Between 1980 and 1984, federal agencies responsible for regulating the environment, land use, and consumer protection were subjected to reductions in staff and budget on the same scale as a number of independent agencies which were being phased out of existence by statute.⁵⁶ This reduced strength made it virtually impossible for many agencies to carry out their unchanged statutory missions. Viewed as neglecting their legal obligations, the agencies became vulnerable to criticism from the press, the Congress, and the public. Reduced capacity also left rule changes vulnerable to legal challenge, since diminished resources made it difficult for agencies to provide the analytic support required to justify proposed shifts in agency rules.

The second miscalculation was the Administration's apparent indifference to the need for neutrality in regulatory procedures and outcomes. Critics condemned highly discretionary enforcement strategies, oversight procedures which remained shielded from public view, and delegation strategies that appeared indifferent to state and local capability.⁵⁷ These critics suspected that the lessened adversarial enforcement approaches, in-

54. See Christiansen & Haveman, *The Reagan Administration's Regulatory Relief Effort: A Mid-term Assessment*, in *THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT* 49, 69-70, 78-79 (G. Eads & M. Fix eds. 1984) [hereinafter cited as *REGULATORY STRATEGY*].

55. Rhetorically, Administration spokesmen were reported to advocate the dramatic, wholesale revision of major social regulatory statutes. For example, in December 1983, Christopher DeMuth, then head of OIRA, reportedly called for the development of a second-term regulatory agenda which would "replace the Clean Air and Water Acts and related environmental laws with laws that emphasize economic incentives rather than mandatory federal standards." C. DeMuth, *Regulatory Policy* 8 (Dec. 9, 1983) (unpublished memorandum on file with the *Yale Journal on Regulation*).

56. After accounting for inflation, the percentage decreases in budget authority of the EPA, the Office of Surface Mining, and the Consumer Product Safety Commission between 1980 and 1984 were about as drastic as those experienced by the Civil Aeronautics Board. G. EADS & M. FIX, *supra* note 18, at 152-53.

57. See, e.g., *Hearings*, *supra* note 45, at 10 (1982) (statement of George H. R. Taylor, Director, Department of Occupational Safety and Health, AFL-CIO); see also *PRESIDENTIAL CONTROL*, *supra* note 25, at 7.

creased centralization, and accelerated delegation were simply attempts to bring about *de facto* deregulation.

Near the end of Reagan's first term, the Administration seemed to lose its interest in regulatory relief. The Administration had suffered a major public relations debacle at EPA. Moreover, the political divisions between proponents of regulatory restraint and regulatory activism deepened, with the debate over social regulation taking on a moral tone.⁵⁸ With an election approaching, Administration rhetoric became conciliatory,⁵⁹ abandoning the bellicose anti-regulation threats heard in the Republican Platform of August 1980.⁶⁰ Regulatory change moved very much off the center of the political stage.

The change was not merely one of style. A set of controversial appointees were replaced,⁶¹ and, at least for the moment, agency budget cuts slowed. Indeed, at the most politically visible regulatory agency—EPA—previous budget cuts were reversed with the assent of the Office of Management and Budget.⁶² Even the language of regulatory change was altered. The term "regulatory relief" was no longer operative, having been replaced by its more traditional forerunner, "regulatory reform."⁶³

Did this mean that a chastened and wiser Reagan Administration was ready to return to the path charted by the Ford and Carter administrations? Certainly, by the end of its first term, the Administration appeared to be moving away from the political rhetoric of regulatory relief towards a more traditional if subdued policy of regulatory reform. At least in the short run, however, the charged political environment the Administration had created by the end of its first term was a serious impediment to such reform in the second term.

58. The tenor of regulatory debate that was taking place towards the end of the first Reagan term is reflected, in part, by the titles of the literature then emerging on the Reagan social regulatory effort. Among the most widely noted were: S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* (1983); J. LASH, K. GILLMAN & D. SHERIDAN, *A SEASON OF SPOILS: THE STORY OF THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT* (1984); J. CLAYBROOK, *RETREAT FROM SAFETY: REAGAN'S ATTACK ON AMERICAN HEALTH* (1984).

59. See Green, *Reagan: The Liberal Democrat*, N.Y. Times, Aug. 15, 1984, at A23, col. 5.

60. "The Republican Party declares war on government overregulation. We pledge to cut down on federal paperwork, cut out excessive regulation, and cut back on the bloated bureaucracy." 126 CONG. REC. 20,625 (1980).

61. See Stansfield, *Ruckelshaus and Clark Seek to Blunt Environmental Lobby's Political Swords*, NAT'L J., June 30, 1984, at 1256.

62. See Mosher, *Ruckelshaus's First Mark on EPA- Another \$165.5 Million for Its Budget*, NAT'L J., June 25, 1983, at 1344.

63. See, e.g., DeMuth, *A Strategy for Regulatory Reform*, REGULATION, Mar.-Apr. 1984, at 25.

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IV. The Prospects for Regulatory Reform in the Second Term: Four Crucial Areas

As the Reagan Administration begins its second term, prospects for sweeping regulatory change appear dim, though not universally bleak. This Section identifies three areas of reform in which the Reagan Administration has endorsed change and significant progress is possible: (1) the development and adoption of market-oriented regulatory innovations, (2) the transfer of regulatory authority to the states, and (3) increased presidential oversight of the regulatory process. The section also examines the possibility of obtaining statutory revision of "aspirational"⁶⁴ social legislation and makes clear that obtaining enduring regulatory reform requires a higher level of political commitment, skill, and patience than has been exhibited by the Administration's attempts at regulatory relief.

A. *Market Oriented Regulatory Innovations*

By the late 1970's, substantial attention had focused on market-oriented regulatory techniques as a more flexible and efficient alternative to the traditional command and control regimes.⁶⁵ It was believed that by decentralizing decision-making and reducing the role of the federal government, market-based alternatives would better account for the diversity of regulated entities, reduce paperwork burdens, and conserve agency resources. Reformers hoped that the new strategies would provide regulated firms with a stronger incentive to comply with regulations, disclose information, and reduce litigation.⁶⁶

Although market-based reforms were supposed to accomplish these sub-

64. See *infra* note 116.

65. The market-oriented alternatives to "command and control" regulatory techniques identified by the Regulatory Council during the Carter Administration included the following:

1. MARKETABLE RIGHTS: the distribution of a limited number of rights to scarce resources that private parties can then buy, sell or trade as market needs dictate.
2. ECONOMIC INCENTIVES: the use of fees or subsidies rather than government enforced standards to encourage private sector achievement of regulatory goals.
3. PERFORMANCE STANDARDS: the replacement of regulations specifying the exact means of compliance (usually detailed design standards) with general targets that the regulated firms can decide how to meet.
4. COMPLIANCE REFORM: the replacement or supplementing of governmental monitoring and enforcement with market oriented mechanisms including third party compliance monitoring, penalties that reflect the degree of non-compliance and supervised self certification.
5. INFORMATION DISCLOSURE: providing users of a product with relevant information about the consequences of using it.
6. VOLUNTARY ACTIONS: reliance on regulatory standards developed by third parties or the regulated firms themselves.

Supra note 11, at v.

66. See generally R. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION* (1983); Spence & Weitzman, *Regulatory Strategies for Pollution Control* in *APPROACHES FOR CONTROLLING AIR POLLUTION* 199 (A. Friedlaender ed. 1978).

stantial goals while illustrating the virtues of the marketplace, they received surprisingly little attention during the first term of the Reagan presidency. A review of the past year's activities, however, suggests that such reforms may be at the forefront of the Administration's regulatory agenda during the second term.

Since their inception, market-based regulatory mechanisms have enjoyed a modest political constituency among academics, and state and federal bureaucrats.⁶⁷ Although support from these constituencies is important, it only partially explains the favorable prospects for market-based reforms during Reagan's second term. Of at least equal importance is the prominence that such reforms have gained as a result of the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*,⁶⁸ which made clear that some of these reforms could be achieved administratively, without the often elusive approval of Congress.

In *Chevron*, the Court upheld the authority of the EPA to implement without legislative approval its market-based "bubble policy"⁶⁹ in geographic areas which have not attained national air quality standards. The bubble policy allows pollution-emitting devices or facilities regulated under the Clean Air Act to set off less expensive pollution reductions at one source against more costly emissions requirements at other sources, as long as aggregate air quality is improved. Emissions trades, including the bubble policy upheld by the court, function as supplements to existing agency rules and are administered within the framework established in controlling legislation. *Chevron* did not disturb, and may indeed have reinforced, the agency's continuing practice of promulgating policies regard-

67. See, e.g., Drayton, *Getting Smarter About Regulation*, HARV. BUS. REV., July-Aug. 1981, at 38.

68. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984).

The narrow question posed by *Chevron* was whether the agency's construction of the term "stationary source" under the Clean Air Act was at variance with Congressional intent. Under the interpretation advanced by the agency, use of the netting element of the agency emissions trading policy could be extended to non-attainment areas and would no longer be limited to those areas of the country found to be in compliance with federal air quality standards. *Id.* at 2780.

69. EPA's emissions trading policy, issued in 1982 and supplemented in 1983, sets forth four related substantive reforms to comply with provisions of the Clean Air Act. The four consist of:

1. the *bubble*, which allows managers of one or more existing plants to trade additional control of cheaply controlled stacks or vents for less control of more expensive sources;
2. *offsets*, which allow new plants or modifications to emit pollutants in non-attainment areas if they secure sufficient reductions from others to improve air quality;
3. *netting*, which allows use of a bubble to avoid burdensome New Source requirements for inplant modifications, so long as plant-wide emissions do not increase significantly; and
4. *banking*, which allows sources to store surplus reductions in a legally protected manner for future use or sale.

M. Russell, *Incentives to Strengthen Regulation of Pesticides: The Uses of Regulatory Reform*, U. N. ENVIRON. PROG. IND. & ENVIRON. NEWSLETTER, July-Sept. 1984, at 8, 9.

ing the use of market mechanisms in the form of policy guidelines, rather than by statute, or by regulation.

In the wake of *Chevron*, EPA intensified its efforts to expand trading concepts to other programs. This effort was spurred by the appointment of the reform-minded William Ruckelshaus as administrator of the agency,⁷⁰ and encouraged by organizations and individuals often identified as supporters of the Reagan Administration.⁷¹ The agency has extended trading principles to new areas within the purview of the Clean Air Act,⁷² including mobile sources.⁷³ Moreover, trading principles have also been applied outside the air program,⁷⁴ and now cover areas such as the amount of leaded gasoline refiners are allowed to produce.⁷⁵

A review of the evolution of market mechanisms reveals that despite the popularity trading principles now enjoy, adoption of market-based reforms remains a slow and complex process. Although the initial EPA experimentation has quieted much skepticism and solved some mechanical problems, many of the problems encountered by the EPA will doubtless resurface. Commentators have noted that when emissions trading was first developed no real constituency for the policy existed.⁷⁶ Even within the EPA, the air and water program staffs and the regional offices initially

70. William Ruckelshaus resigned as EPA administrator on November 30, 1984. Lee A. Thomas, former chief of the agency's hazardous waste control programs, was named to replace him. N. Y. Times, Nov. 30, 1984, at A1, col. 2.

71. See, e.g., Clark, *The Environmental Protection Agency in MANDATE FOR LEADERSHIP II* 84 (1985). Clark writes:

Excessive costs also result when regulators use "command and control" regulations . . . rather than using regulatory systems that permit the flexibility that results from market systems. Regulatory systems can introduce market flexibility by allowing manufacturers to exchange cleanup obligations, so that firms that face a high cost to reduce a given increment of a pollutant can contract with other firms to achieve the same level of cleanup at lower cost.

Id. at 84.

72. One example would be EPA's recent internal decision to allow new sources of air pollution to use emission credits, trading, banking, or a bubble under the Clean Air Act in non-attainment areas without a demonstrated attainment plan. See *Alm Approves New Source Bubble Proposals*, ENV'T REP. (BNA) 1468 (Jan. 11, 1985).

73. In October 1984, EPA proposed an averaging program for diesel particulate emissions from heavy duty trucks. The program would allow some engines with emissions that are more difficult to control to exceed the emission standard so long as the sales weighted total emissions level does not exceed federal designated minimum standards. 49 Fed. Reg. 40,248 (1984) (to be codified at 40 C.F.R. § 86).

74. The agency's Water Innovation Project is examining state experience with point source trades, trades between point and non-point sources, as well as the use of banking strategies to control water pollution. See EPA ANN. REG. REP. 7 (1983).

75. In November 1982, EPA introduced a policy of permitting lead trading among gasoline refiners and importers. The agency's lead trading policy was extended through 1987 under a policy which would encourage refiners and importers to take actions to reduce the lead content of the gasoline they produce or sell earlier rather than later. See *Extensions of Lead Trading Rights to 1987*, ENV'T REP. (BNA) 1469 (Jan. 11, 1985).

76. See Levin, *Getting There: Implementing the "Bubble" Policy*, in SOCIAL REGULATION: STRATEGIES FOR REFORM 59, 65 (E. Bardach & R. Kagan eds. 1982).

resisted the program. Agency officials feared that the trading would be unduly resource intensive and would distract from more pressing administrative functions.⁷⁷ Almost eight years of institutional commitment of political capital and resources were required to overcome political resistance to the policy. Led by the agency's regulatory reform staff, the process involved selling emissions trading to the agency's central and regional office bureaucracies, to national public interest groups, to industry, and to local and state officials.

Some of the pioneering work done at the EPA will make future attempts to implement market-based reforms easier. The agency's use of economic incentives to entice states to assume program responsibilities is one such innovation.⁷⁸ The agency's efforts to introduce regulatory negotiation⁷⁹ and to reexamine environmental auditing may also prove useful.⁸⁰

Nevertheless, rapid and easy progress is improbable because trading principles tax the political, legal, and technical capacity of regulating entities in ways that are not susceptible to simple solutions. Indeed, a recent survey indicates that although most state and regional air officials believed that emissions trading is a good idea, the officials continue to experience many problems. Unresolved issues and procedural requirements continue to cause frustration in program implementation and significant delays. Finally, those surveyed often voiced dissatisfaction with the complexity of the trading policy and expressed a need for more detailed guidance.⁸¹

The prospect of severe budget cuts at federal regulatory agencies also poses a substantial threat to broader application of trading principles—at least in the near term. Budget cuts could disrupt research and development, and limit the scope of federal oversight and the amount of technical assistance provided to state regulators. Given the complexity of the review and enforcement process, and the incentives which polluters have to claim unjustified credits, steep cuts could be disastrous.

77. *Id.* at 69-71, 78-79.

78. *See, e.g.*, 47 Fed. Reg. 15,076 (1982); 48 Fed. Reg. 39,580 (1983).

79. The agency's regulatory negotiation project is exploring ways in which to develop regulations by negotiation. The proposed regulations governing diesel emissions from heavy trucks (*see* Levin, *supra* note 76) were worked out through an early experiment with the process. *See* N.Y. Times, Dec. 6, 1984, at A22, col. 1.

80. In the area of environmental auditing (the development of internal management systems for reviewing facility operations to determine compliance with environmental regulations), the agency has completed a large scale research effort on the use of auditing in agency enforcement activities. *See* ARTHUR D. LITTLE, INC., CURRENT PRACTICES IN ENVIRONMENTAL AUDITING (1984) (report prepared for EPA).

81. *See* JELLINEK, SCHWARTZ, CONNOLLY & FRESHMAN, INC., EMISSIONS TRADING IN SELECTED EPA REGIONS (1984) (report prepared for EPA).

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B. *Regulatory Federalism: Continued Delegation of Regulatory Authority to the States*

Although market-based regulatory mechanisms received scant attention in the early years of the Administration's first term, the same cannot be said of regulatory federalism. Almost from the day Carter left office, the Reagan Administration vigorously pursued a policy of delegating regulatory authority to the states. Indeed, the Administration effected significant transfers of authority during its first term⁸² and probably will continue to do so. Moreover, these delegations are likely to be among the most enduring of the Administration's regulatory actions.

It would be oversimplifying, however, to view regulatory federalism as an irresistible force. In fact, devolution seemed to slow toward the end of the first term as a somewhat more deliberate approach appeared to emerge, perhaps reflecting political resistance to regulatory federalism. During the past year, for example, EPA began a major review of state programs operating under the Clean Water Act.⁸³ Although second thoughts about state regulatory authority appear more the exception than the rule, it appears that regulatory federalism will be pursued with a more considered accounting of political costs.

1. *Factors Influencing Further Delegation*

The pace, scope, and endurance of regulatory decentralization in the second term are likely to be influenced by the availability of federal funds to support the regulatory activities assumed by the states, the receptivity of industry to strengthened state regulatory roles, and the opposition of state and public interest groups to delegations of authority that appear to be mere smokescreens for deregulation.

Rhetoric of the New Federalism campaign notwithstanding, when Administration budget priorities have clashed with state preferences, state interests have frequently been overridden. If this continues to be true, further budget cuts could impede delegation of regulatory responsibilities to the states. Severe cuts in federal funding of state environmental programs, combined with strong fiscal pressures on state government, would diminish the prospect for future delegation of EPA authority. Funding cuts will particularly chill delegation in spheres of expanding federal regulation, such as federal pre-treatment programs created by the Clean Water Act. In a recent letter to Senator Patrick Leahy, former EPA Administrator Ruckelshaus stated that a tenfold increase in federal staffing would be

82. See *supra* note 39.

83. Ronald Reagan's Second-term Agenda, *FORTUNE*, Oct. 1, 1984, at 26, 30.

required to implement the program.⁸⁴ Staff increases of similar scope are expected to be necessary in the twenty-five states that have assumed authority for administering the pre-treatment program.⁸⁵ In the absence of assured federal funding, it is unlikely that additional states will seek authorization to administer their own program.

Industry can also act as a formidable check on the delegation of regulatory authority to the states, especially when regulatory authority is fragmented in a manner which imposes substantial costs on powerful industries. In business spheres where uniform federal standards promote economies of scale, support for nationally administered regulatory programs, rather than state delegation, is dominant.⁸⁶ In instances where conflicts between state and business interests have arisen over delegation to date, the Administration has shown a strong predilection to sacrifice its oft-enunciated federalism principles and side with business.⁸⁷

When the delegation of federal regulatory responsibility appears to cloak an effort by the Administration to abandon statutory responsibility, opposition by the states themselves, as well as public interest groups, is a further check on regulatory federalism. For example, attempts by the Army Corps of Engineers to abandon responsibility for policing headwaters and inland lakes⁸⁸ have met with united and forceful opposition from a group of state governments.⁸⁹ Similarly, the National Wildlife Federation recently led a successful legal challenge to regulations issued by the Office of Surface Mining that would have improperly delegated to states the power to approve surface mining plans on federal lands.⁹⁰

84. *Significant Increase in Staff Level Needed to Carry Out Pre-treatment Program, EPA Says*, ENV'T REP. (BNA) 534 (August 8, 1984).

85. *Id.*

86. See G. EADS & M. FIX, *supra* note 18, at 230.

87. In *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm.*, 457 U.S. 1132 (1983), the federal government joined the petitioners in arguing successfully that a California statute authorizing a moratorium on nuclear power plant construction was preempted by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284 (1982). In *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984), the Court rejected the government's argument and held that federal law did not preempt state laws allowing punitive damages awards against companies which allowed their employees to become contaminated with radiation.

Note also the Administration's preemption of state hazardous workplace rules. Hazard Communication, 48 Fed. Reg. 53,280 (1983) (codified at 29 C.F.R. § 1910.5); see also G. EADS & M. FIX, *supra* note 18, at 230-31 (describing willingness of federal government to preempt state law when desirable).

88. See 47 Fed. Reg. 31,794 (1982) (codified in scattered sections of 33 C.F.R.).

89. See G. EADS & M. FIX, *supra* note 18, at 223-24.

90. *In re Permanent Surface Mining Regulation Litigation*, 21 ENV'T REP. (BNA) 1724 (D.D.C. July 6, 1984).

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2. *Why Delegation is Likely to Continue*

As the above discussion indicates, the Administration obviously cannot treat regulatory federalism as trouble-free. Additional delegation will require attention to political cost and expedience. Nonetheless, regulatory devolution will continue during the second term and those delegations that have already occurred will for the most part endure. These two facts can be attributed to three characteristics of the delegation of regulatory power: (1) it is supported by the delegates; (2) it attracts little publicity; and (3) it is consistent with the policies of prior administrations.

Delegation enjoys considerable political support among the delegates. State legislators and administrators consistently place a high value on program autonomy.⁹¹ These officials recognize that heightened regulatory autonomy provides them with greater influence over the context within which trade-offs between regulatory protections and economic developments take place.⁹² They are also aware that state regulatory autonomy gives them the opportunity to assume credit for successful regulatory programs. Although this makes it harder for them to shift blame for regulatory failures onto federal bureaucrats, state regulators generally prefer the enhanced power and autonomy promised by regulatory federalism.⁹³

Delegation also has the advantage of achieving reform through relatively informal administrative channels that are removed from public attention and media focus. With few exceptions, delegations completed to date have generated little political controversy. Often, transfers of regulatory authority do not require agency rulemaking or even conformance with the modest dictates of the Administrative Procedure Act.⁹⁴ A comparatively small group of professionals structures the labyrinthine relations between local, state and federal regulatory agencies.⁹⁵ Such a concentrated locus of policy-making power, to which outsiders have limited access, enables allocative decisions to take place without significant public debate or media attention. As a result, external political pressures sufficient to produce policy reversals will probably not be brought to bear on the Admin-

91. Fix, *Transferring Federal Regulatory Authority to the States*, in *REGULATORY STRATEGY*, *supra* note 54, at 153, 163.

92. Mashaw & Rose-Ackerman, *Federalism and Regulation*, in *REGULATORY STRATEGY*, *supra* note 54, at 111.

93. *Id.* at 122-27.

94. For example, regulatory authority is de facto transferred when federal oversight of state regulatory activity is diminished. See G. EADS & M. FIX, *supra* note 18, at 211.

95. Obviously, this is a characteristic which delegation shares with emissions trading policy. See generally E. Meidinger, *The Politics of Market Mechanisms in U.S. Air Pollution Policy: On the Emerging Culture of Regulation* (March 1984) (paper presented at the Conference on Distributional Conflicts in Environmental-Resource Policy, Berlin, West Germany).

istration's movement toward regulatory decentralization with any ease or frequency.

A third reason delegation should endure is that Reagan's transfer of regulatory authority to lower levels of government represents an accelerated continuation of policies put in place by previous administrations. Regulatory federalism is not a radical break from past policy, or from the principles upon which such policy rests. The policy of regulatory delegation, like that of reliance on market mechanisms, is premised on political and economic theories of greater maturity and broader currency than those regulatory policies driven by the "supply-side" economics which the Reagan Administration embraced. This foundation in accepted theory and recent history should render regulatory federalism less vulnerable to attack by academic and political critics.

C. *Future Directions for White House Oversight*

The beginning of Ronald Reagan's second term, like the beginning of his first, witnessed the issuance of an executive order concerning regulatory oversight.⁹⁶ The content of that second order, as well as the virtual absence of controversy surrounding it, reveals a great deal about the likely course of White House oversight of regulation during Reagan's second term. The most recent order establishes, in effect, a regulatory budget without numbers. It creates a process by which OMB, working with executive branch agencies, will develop and publish an administration regulatory program.⁹⁷ This program will reflect "the administration's regulatory goals and objectives,"⁹⁸ much as the President's annual financial budget reflects his administration's economic goals and objectives.

In its most extreme form, the concept of a regulatory budget is closely analogous to that of a financial budget. Costs and benefits would be estimated in dollar terms for all proposed regulations. Through a process akin to that employed in putting together a financial budget, agencies would be allotted ceilings representing the total regulatory costs they would be permitted to impose on the economy. Once these ceilings were set, the precise details of how regulations were written and imposed would be left to the agencies. OMB's work would be done.⁹⁹

The idea of a regulatory budget—with or without numbers—is not new. While many economists viewed the increased use of cost-benefit

96. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

97. *Id.*

98. *Id.*

99. See DeMuth, *Constrain Regulatory Costs: Part II, The Regulatory Budget*, REGULATION, Mar.-Apr. 1980, at 30-31.

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analysis as the tool by which “excessive and inefficient” regulation might be controlled, others had long argued that executive oversight by itself would accomplish little of value.¹⁰⁰ They believed that increased oversight would be nothing but window dressing unless the incentives facing regulators were fundamentally changed. Their solution was to put the regulators on a “budget,” making them balance the costs of regulatory programs against perceived benefits. Proposals for a regulatory budget, however, created only a brief stir. Economists debated whether the numbers necessary for such a budget could ever be developed, and the debates themselves resulted in widespread recognition that a full-blown regulatory budget was impractical.¹⁰¹

The 1985 Reagan executive order resurrects the regulatory budget concept in a radically altered form. Those who previously advocated establishing a regulatory budget had focused on its utility as a technique for program control.¹⁰² But such a budget can also serve as an instrument for political control. Budgets are political statements which are manifestations of a government’s priorities.¹⁰³ Reagan’s new “regulatory budget without numbers” has the potential of fulfilling this political purpose.

Assembling a workable regulatory budget document will be a formidable undertaking. It remains to be seen whether OMB—and especially OIRA—is capable of the task. Certainly, institutionalization of regulatory budgets will require a significantly increased commitment of resources by OMB. It will also require that the OMB Director have the ability and desire to understand the scope and content of executive branch regulatory programs. The position of OMB director must thus evolve from that of a professional budgeteer to a political professional with a broader, more policy-oriented perspective.¹⁰⁴ Preparation of a regulatory budget without

100. Among the most vocal of these economists was Christopher DeMuth, who later became head of Reagan’s Office of Information and Regulatory Affairs. In a 1980 two-part article in *Regulation*, DeMuth first reviewed the history of presidential efforts to control regulation and found them fatally flawed. He then proposed the idea of the regulatory budget—although he was not the first to do so. See DeMuth, *Constrain Regulatory Costs: Part I, The White House Review Programs*, *REGULATION*, Jan.-Feb. 1980, at 13; DeMuth, *supra* note 99, at 29.

101. For a summary of the arguments in these debates, see R. LITAN & W. NORDHAUS, *REFORMING FEDERAL REGULATION* 133-58 (1983).

102. G. EADS & M. FIX, *supra* note 18, at 99-100.

103. Presidents in the early part of this century moved to create a unified Executive Branch budget. Individual agencies had previously submitted their budgets directly to the Congress. The change has enabled presidents to develop a coherent set of priorities that reflect the aims of their administrations as well as to exert detailed control over various programs.

104. The current OMB director, David Stockman, fits the latter description. Prior to becoming head of OMB he had served for two terms as a Republican Congressman from Michigan. In that capacity he was heavily involved in observing and shaping federal regulatory activity. See, e.g., Stockman, *Address*, in *GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE* 393 (D. Ginsberg & W. Abernathy eds. 1980).

numbers will shift the agency's focus further away from preparation of a financial budget and toward a broader executive branch managerial role.

It is unclear how Congress will greet such a change. In a real sense, the creation of a regulatory budget without numbers represents a greater shift in power from the Congress to the President than did the consolidation of oversight power within OMB in 1981. Reagan's 1981 executive order followed in the tradition of similar efforts by Reagan's three predecessors to exercise control over regulations issued by agencies of the executive branch.¹⁰⁵ Only in the order's implementation was there a break from tradition. In contrast, the 1985 executive order asserts that the President has the power to take various regulatory programs established by the Congress and combine them into an "administration regulatory program" that reflects his priorities.¹⁰⁶ Where Congressionally-mandated guidelines do not exist, OMB can set the level and scope of social regulation. Given the apparent immunity of oversight to legal challenges,¹⁰⁷ this program gives the President enormous power to shape the regulatory process—provided he is able to appoint regulators who can avoid the legal pitfalls and congressional problems that hampered the Reagan Administration during its first term.¹⁰⁸

Congress might react to the introduction of a regulatory budget and the accompanying shift of power to the executive in many ways. Some committees have already indicated that they will require agencies over which they exercise oversight to submit their regulatory agendas to Congress *before* they submit them to OMB.¹⁰⁹ Presumably, this would enable the committees to gauge how much OMB alters these agendas in developing the Administration's annual regulatory program.¹¹⁰ Congress could also respond by revising agency authorizing legislation to reduce executive discretion, as it did in the recent revision of the Resource Conservation and

105. G. EADS & M. FIX, *supra* note 18, at 45-67.

106. Exec. Order No. 12,498, *supra* note 96.

107. See, e.g., *Center for Science in the Pub. Interest v. Dep't of Treasury*, 573 F. Supp. 1168, 1178 (D.D.C. 1983) (Administrative Procedure Act did not require agency to disclose contacts and information received in informal rulemaking); *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985) (scope of arbitrary and capricious standard is narrow and court is not to substitute its judgment for that of agency).

108. See *supra* notes 27-32 and accompanying text.

109. Agencies under the purview of the House Energy and Commerce Committees will have to satisfy this requirement. See *Broadened Powers Give Budget Office Control Over Rules*, N.Y. Times, Dec. 20, 1983, at A1, col. 1.

110. Indeed some legislative movement along these lines may already be perceptible. S. 2433, 98th Cong., 2d Sess. § 8(g)(1)(A) (1984), proposing revisions to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501-3520 (1982), would have required that the administrators of federal regulatory agencies make publicly available a copy of any draft of a proposed or final rule submitted by an agency for review to the Office of Information and Regulatory Affairs.

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Recovery Act.¹¹¹ Alternatively, it could achieve the same result by imposing tight deadlines and narrow requirements on the scope of permissible regulations. This would prevent the Administration from developing its own separate regulatory program by removing the leverage that regulators in the executive branch have to influence the timing and content of agency rules and regulations.

Congress itself could attempt to become involved in the regulatory budgeting process. The role that OMB has come to play in reviewing regulations is not substantially different from the role it plays in assembling the Administration's financial budget or in "clearing" Administration testimony and legislation. Secrecy and behind-the-scenes bargaining characterize all of these processes. Compared to the process of regulatory review, however, budget review and legislative clearance generate relatively little controversy. This is because the results of these reviews go to the Congress. If Senators or Representatives do not like the results, they are in a position to act directly to change them. This is not the case with regulation. To be sure, Congressional committees can hold oversight hearings or use budget riders to try to control how agencies regulate.¹¹² These avenues of control, however, are less satisfactory methods of expressing legislative intent than is actual legislation. It is thus not clear how successful Congress could be in exercising control through its own regulatory budgeting.

Congress' likely response to regulatory budgeting is as yet unclear. We believe, however, that the simultaneous referral of a draft regulatory agenda to OMB and to the Congress would probably be an ineffective technique for Congressional control, as simultaneous submission of independent regulatory commission budgets has been. We have no evidence that this dual review has given Congress any additional leverage in setting those agencies' budgets. We, however, also believe that it would be extremely undesirable for Congress itself to start drafting regulations. Congress originally delegated rulemaking authority to executive agencies because it recognized that it could not handle the job itself.¹¹³ Much of the arbitrariness and inefficiency of regulation results from regulators being forced to implement highly detailed statutory standards which leave little room for administrative flexibility. If anything, regulators need more, not less, discretion. Congress should, therefore, focus on promoting the responsible use of discretion and not second-guess day-to-day decisions of

111. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, tit. 2, 98 Stat. 3221, 3226-66 (amending the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 (1982)).

112. Until it was declared unconstitutional, see *INS v. Chadha*, 462 U.S. 919 (1983), Congress increasingly resorted to the use of the legislative veto as a means of controlling agency action.

113. See, e.g., R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 74, 425 (1941).

regulators who seek to fashion coherent regulatory programs. Congress does have an important role to play in setting the tone of regulatory activities by taking a comprehensive look at regulatory priorities. Unless such broad scale reviews are conducted, the Congress will surrender to the executive the power to set regulatory priorities.

D. *The Prospects for Legislative Reform*

In stark contrast to its attempts to encourage the adoption of market mechanisms, delegate regulatory authority, and expand executive oversight, the Administration's record in pressing for and obtaining legislative changes has been dismal.¹¹⁴ For a number of reasons, the prospects for legislative change during the second term are no brighter.

First, the spillover effects of the political controversy which characterized the early years of Reagan's regulatory relief program have been most acutely felt in the legislative arena.¹¹⁵ By 1980, bipartisan political support was beginning to center around revising what have been termed the "aspirational" provisions of a number of prominent pieces of social legislation.¹¹⁶ The statutes' aspirational goals were seen as creating institutional tensions among the three branches of government, between agencies and firms, and between federal and state regulators. The regulatory misadventures of the Administration's early years, however, provided a textbook lesson on how to stimulate public support for strengthening the na-

114. In a memorandum to the Cabinet Council on Economic Affairs, Christopher DeMuth, then head of OIRA, stated "[I]n the [first] three years [of the Reagan Administration] we have not advanced a single detailed proposal of our own for reform of any of the major health, safety, or environmental statutes." C. Demuth, *Regulatory Policy* 5 (Dec. 9, 1983) (unpublished memorandum on file with the *Yale Journal on Regulation*).

115. Murray Weidenbaum's comments in a paper prepared for a June 1983 Urban Institute Conference provide a fitting assessment of the political climate: "We will be lucky if, by January 1985 we are back where we were in January 1981 in terms of the public's attitude toward statutory reform and social regulation." Weidenbaum, *Regulatory Reform Under the Reagan Administration*, in *REGULATORY STRATEGY*, *supra* note 54, at 15, 38.

116. The term, coined by Yale Law School Professor Jerry Mashaw, refers to an absolute legislative approach. See J. Mashaw, Remarks at Urban Institute Conference (June 22-23, 1983). A short list of these provisions would probably start with the Delaney Clause to the Federal Food, Drug and Cosmetic Act which bans all food additives "found . . . to induce cancer in man or animal" even if some putatively safe level for human use could be established. 21 U.S.C. § 348(c)(3)(A) (1982). The clause is, thus, thought to set a no-risk goal for the carcinogenicity of food additives and to prohibit, in effect, a weighing of costs or an assessment of comparative health risks associated with the ban. See generally L. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* 11-15 (1981).

Another likely candidate for the "short" list of aspirational enactments would be the provisions setting National Ambient Air Quality Standards under the 1970 Clean Air Amendments. 40 C.F.R. § 50.1-12 (1984). The 1970 Amendments have been criticized as costly, inefficient, indifferent to location, inhibiting modernization, and, paradoxically, increasing the total amount of pollution exposure. See Harrison & Portney, *Remedy for the Clean Air Act*, *REGULATION*, Mar.-Apr. 1981, at 27.

Moreover, the Act has been interpreted in a manner which does not permit the balancing of costs and benefits in designating exposure levels. See *id.* at 25.

tion's social legislation. When Ronald Reagan took office in 1981, the percentage of citizens believing that some relaxation of federal environmental laws would be appropriate was at an eight-year high.¹¹⁷ Midway through the President's first term, the polls showed not only a sharp drop in the percentage of citizens believing that environmental laws and regulations had gone too far, but also a substantial rise in the percentage of respondents believing that they had not gone far enough.¹¹⁸

Second, legislative change is often politically expensive. If the Reagan Administration has provided future presidents with a valuable lesson on achieving their political objectives, it is that success comes from concentrating political capital on a narrow and achievable agenda.¹¹⁹ Judging from the Administration's first term, it can be assumed that the President and his staff will deploy their political capital to control the shape of budget and tax measures, choosing not to expend such capital on reform measures for social regulations.

Finally, as we have documented,¹²⁰ substantial change in the day-to-day administration of the regulatory process, in the focus of regulatory authority, and even in the designation of selected regulatory standards can be accomplished without legislative change. These administrative opportunities may make the bruising, relatively public process of legislative change seem unnecessary, if not politically inadvisable.

In sum, the unfavorable political climate for legislative action, its high political cost, and the opportunities for regulatory change available elsewhere indicate that legislative stasis is likely. Indeed, it is clear that regulatory relief objectives did not underlie legislative activity in the 98th Congress. While the term ended with a host of major environmental laws (including the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act) remaining to be reauthorized, the one bill which did pass—the amendments to the Resource Conservation and Recovery Act¹²¹—provided evidence that proposals for regulatory relief have had little effect on current legislation. The bill not only expanded EPA's regulatory responsibilities,¹²² but also eliminated agency discretion by setting very specific agency priorities in the processing of permits.¹²³

117. The group, though, remained small, representing only 23% of those polled. See THE CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 1982, at 425, fig. 9.11 (1982).

118. *Id.*

119. See Salamon & Lund, *Governance in the Reagan Era—An Overview* in THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA 17-18 (1985).

120. G. EADS & M. FIX, *supra* note 18, at 179-89.

121. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 221, 98 Stat. 3221, 3248-51 (codified at 42 U.S.C. § 6921) (1984).

122. It required for the first time that generators disposing between 100 and 1000 kilograms of hazardous waste per month dispose of their waste at a RCRA-approved facility.

123. See, e.g., *id.* § 201(e) (prohibiting land disposal of solvents and wastes containing dioxin

Conclusion

After having failed to take advantage of a significant opportunity for change during its first term, the Reagan Administration has apparently reconciled itself to spending the next four years on the legislative sidelines as well. As James C. Miller III, Chairman of the Federal Trade Commission, recently said, "The President is just going to let the glue dry on deregulation."¹²⁴ If Miller's prognosis is correct, the Administration's regulatory legacy will be quite different from the one which the President might have hoped for and expected. In the absence of legislative change, the Reagan legacy will be broadened administrative discretion and a greater presidential control over the course of social regulation. While this might give deregulation-minded presidents like Ronald Reagan an opportunity to reduce perceived regulatory burdens, it also gives presidents with differing philosophies the power and the tools they need to turn regulation to quite different ends.

beginning 24 months after enactment); § 201(d) (banning hazardous wastes on the "California list"—cyanide, arsenic, lead, mercury, etc.—from land disposal beginning 32 months after enactment); § 103(a) (appointing an ombudsman to respond to citizen inquiries regarding RCRA programs); § 202(a) (requiring the promulgation of regulations within 30 months requiring that all new landfills, surface impoundments, waste piles, underground tanks, and land treatment units use approved leak detection systems); § 231 (ensuring that 12 months after enactment every hazardous waste treatment, storage, or disposal facility has a permit and shall be inspected at least every two years).

124. *Ronald Reagan's Second-term Agenda*, FORTUNE, Oct. 1, 1984, at 26, 30.